

Awarding costs in international arbitration

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Plan of the presentation

- I. Introduction**
- II. Which costs are recoverable?**
- III. How are the costs assessed?**
- IV. How are the costs allocated?**
- V. Final remarks**

I. Introduction

- the tribunal's power to rule on costs
(obligation – ICC Rules, AAA Rules, LCIA Rules, SCC Rules, UNCITRAL Rules, ICSID Rules)
- no uniform regulation
- each institution has its own rules
- *ad hoc* arbitration – lack of rules / standards
- discretionary powers of the arbitral tribunals to award the costs
- is there an uniform practice / common rules?

I.(2) Introduction

- **Decision on the costs**
 - in the final award
 - in the partial award
 - separate decision on costs

e.g. interim measures ordering a party to pay the arbitration costs (in a case it fails to pay its share)

II. Which costs are recoverable?

Costs of arbitration include...

I. Costs of the arbitration:

- fees and expenses of arbitrators
- fees and expenses of administering institution
- fees and expenses of experts appointed by the arbitral tribunal
- fees and expenses of administrative secretary, registrar etc.
- costs involved in organizing hearings

II. Costs of the parties (legal costs):

- legal costs and expenses
- other professional fees and expenses (expert witnesses, hotel and traveling expenses of the lawyers, witnesses, and others concerned)

II.(2) Which costs are recoverable?

Two categories, two different approaches:

- **Costs of arbitration**

- fixed by the arbitral tribunal, or
- fixed by the institution according to its cost schedules (ICC, LCIA, SCC)
- usually advanced by the parties in equal shares during arbitration

- **Costs of the parties (legal costs, other)**

- depend on each parties own decisions (no equality)
- no cost schedules (nor other rules / limits)
- discretion of the arbitral tribunal

II.(3) Which costs of the parties are recoverable?

- **Legal costs are recoverable if:**
 1. they were incurred for the specific purpose of arbitration („necessary”)
 2. they may be regarded as „party costs” under the applicable rules / law
 3. the costs were „reasonable”
 - the criteria of reasonableness adopted e.g. in:
 - UNCITAL Rules Article 38 (1) (e)
 - ICC Rules (2008) Article 31 (1)
 - LCIA Rules Article 28.3
 - SCC Rules Article 44
 - DIS Rules Article 35

II.(4) Are success fee agreements costs recoverable?

- *success fee agreements*:
 - *conditional fee agreement (pactum de palmario)* - 'no win, less fee'
 - *contingency fee agreement (pactum de quota litis)* - 'no win, no fee'
- institutional rules silent on success fee agreements → arbitration agreements / the tribunals' discretion
- criterion of reasonableness
 - taking that **reasonable costs** = 100% = e.g. 1000 EUR
 - *pactum de palmario*
 - LOSS – e.g. 70% = 700 EUR (basic pay)
 - WIN – e.g. 120% = 1200 EUR
 - in such case the tribunal awards 1000 EUR
 - *pactum de quota litis*
 - LOSS – 0 EUR
 - WIN – e.g. 1200 EUR
 - in such case the tribunal awards 1000 EUR

II.(5) Are other (e.g. internal) costs of the parties recoverable?

- **Examples of internal costs incurred by the parties involved in arbitration:**

- in-house lawyers participation
- employees summoned as witnesses, party experts
- executive time

- **Traditional approach:**

Costs of the parties include **only** „out-of-pocket-expenses”

- **Costs of the in-house lawyers:**

- no clear pattern
- example of successful recovery: **ICC Case No. 6564**
„There is no justification to privilege a party in terms of costs for the sole reason that it retained outside rather than a in-house counsel.”
- question of burden of proof (e.g. no time record systems)

III. Assessment of costs

- the criteria of necessity and reasonableness also applicable
- the „broad-brush” approach
 - the test for reasonableness of the amount of costs

*„The pragmatic fact that a businessman has agreed to pay a bill, not knowing whether or not the Tribunal would reimburse the expenses, is a strong indication that the amount billed was considered reasonable by a reasonable man spending his own money, or the money of the corporation he serves. **That is a classic test of reasonableness.**”*

Iran US Claims Tribunal, Separate opinion of Judge Holtzmann; reported in Iranian Assets Litigation Reporter 10860 at 10863; 8 Iran–US CTR 329 at 332–333

IV. Cost allocation

- **Typical solutions**
 - The losing party bears all the costs, including reasonable costs incurred by the successful party (English approach)
 - The costs are allocated in proportion to the outcome of the case (Continental Europe approach)
 - The costs are shared equally between the parties
 - US traditional rule as to legal and other costs
 - the winning party is not awarded its own legal and other costs from the losing party (unless there is a contractual provision to the contrary)

IV.(2) Cost allocation

The „costs follow the event” approach

- **the rule:**

The losing party must bear both the arbitration costs and the legal costs of the prevailing party.

- **justification:**

„For the successful party, the costs of bringing a claim before an arbitral tribunal is the cost of making the other party comply with its responsibilities.” J. Rossel

- **is the rule applied by arbitral institutions?**

yes	no
<ul style="list-style-type: none">▪ UNCITRAL Rules, art. 42(1)▪ LCIA Rules, art. 28(4)▪ SCC Rules, art. 44	<ul style="list-style-type: none">▪ ICC Rules 1998 and 2012, art.. 38(4)▪ VIAC Rules, art. 31▪ ACPCC Rules § 43(4)

IV.⁽³⁾ Cost allocation

The „costs follow the event” approach -
decision on costs as a sanction for procedural misconduct

Example: ICC Case No. 8486 (1996)

*“Nonetheless, **the costs of the arbitration shall be borne totally by the defendant** ... According to good faith, the parties to an international arbitration must in particular facilitate the proceedings and abstain from all delaying tactics ... **The behavior of the defendant during the entire proceedings did not comply with these requirements in any way.**”*

24 Y.B. Com. Arb. 172 (1999)

IV.(4) Cost allocation

Limitations to the „costs follow the event” rule

The arbitral tribunal may limit the amount of reasonable, recoverable costs awarded to the prevailing party, if, e.g.:

- ✓ the party conducted the arbitration improperly
- ✓ the party grossly exaggerated its claims or
- ✓ the party's conduct was not reasonable

IV.(5) Cost allocation

Limitations to the „costs follow the event” rule

Example: ICC Case No. 5726 (1992)

*„Again we have a considerable discretion, which we propose to exercise in the manner which is usually adopted in relation to an arbitration proceeding in England, which is that **the successful party should recover the costs of the arbitration.** (...)*

There is, however, one matter which does trouble us and that is that the amounts claimed by the Claimants were in our view unjustifiably inflated, resulting in unnecessarily high fees having to be deposited with the ICC. This exaggeration has had little effect on the amount of work which has had to be done, which has been considerable, but we think the Claimants should not recover from the Respondents the full amount of the advance on fees which they paid to the ICC.

4 ICC Bull. 35 (1993)

V. Final remarks

- no fixed rules
- discretion of the tribunals, granted by arbitration agreement / rules
- principles, such as the „costs follow the event” rule, serve only as starting points
- conduct of the parties is a decisive criteria both for the assessment and for the allocation of costs

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Thank you!

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